PERNIAGAAN HUP GUAN

v.

CHONG KEW & ANOR

HIGH COURT MALAYA, MELAKA
SURIYADI HALIM OMAR J
[CIVIL APPEAL NO: 12-15-1996]
27 NOVEMBER 1997

CIVIL PROCEDURE: *Appeal - Fact, findings of - Interference by appellate court - Principles applicable - Whether judge had erred*

A suit was filed by the plaintiff for the price of timber supposedly sold and delivered to the defendants. The defendants averred that the debt accrued was not as against the plaintiff, but one Lian Yew Timber, a third party. The plaintiff was successful and the defendants appealed.

Held:

[1] This appeal hinged largely on the issue of findings of facts, whereby the presiding judge would be in an elevated position to assess not only the demeanour of the witnesses but also to appreciate the contents of the documents adduced by them. But it is also trite law that where the judge has clearly erred, the court is not prevented from interfering with the decision of the judge.

[2] All documents certainly confirmed that a contract between the defendants and Lian Yew Timber did exist. If Lian Yew Timber had internally subcontracted the works of felling the logs to the plaintiff, then the defendants ought not to be dragged into their transaction. If any debt was due from the defendants, it was for Lian Yew Timber to seek recourse and compensation from them, but certainly not the plaintiff.

[3] Under the law, in particular the law of agency, the plaintiff would at best be the agent of Lian Yew Timber, and hence legally incompetent to sue the defendant in this case.

[4] The act of rejecting five defence exhibits by the Sessions Court judge was a totally misconceived approach. In this case, as the allegation was that there was no contract, the extrinsic and the oral evidence thus should have been considered.

[5] The Sessions Court judge had leaned heavily on the testimony of two witnesses for the plaintiff only and not given consideration to the evidence of the other defence witnesses.

[Appeal allowed with costs.]

Case(s) referred to:

Armagas Ltd v. Mundogas SA (The 'Ocean Frost') ***(refd)***

China Airlines Limited v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 ***(refd)***

Datuk Eric Taylor v. Lim Foo Yong & Sons Realty Sdn Bhd [1990] 1 CLJ 415 ***(refd)***

Eastern & Oriental Hotel (1951) Sdn Bhd v. Ellarious George Fernandez & Anor [1989] 1 MLJ 35 ***(refd)***

Pernas Trading Sdn Bhd v. Persatuan Peladang Bakti Melaka [1979] 2 MLJ 124 ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 74, 183

Evidence Act 1950, ss. 91, 92, 114(g)

For the appellant - Hillary D'Cruz; M/s KP Ng & Amardas

For the respondent - Mura Raju; M/s Mura Raju & Co

Reported by Yow Ting Fong

JUDGMENT

Suriyadi Halim Omar J:

A suit was filed by the plaintiff-cum-respondent against the defendants-cum-appellant at the Sessions Court, for the sum of RM51,736.65, being payment of the price of timber supposedly sold and delivered to the defendants. The defendants, who were sued in their capacity as partners averred that the debt, which accrued was not as against the plaintiff, but a third party called Lian Yew Timber. Regretfully for the defendants, the plaintiff was successful, resulting in them filing the necessary appeal papers. For purposes of the hearing before me, the defendants had supplied seven grounds, of which I have split them into three groups, namely:

1. group 1, made up of grounds 2 and 6, basically on the critical examination of the findings of facts;

2. group 2, comprising grounds 1 and 3, which relates to the issue of agency, issue of privity of contract, and matters pertaining to ss. 91 and 92 of the Evidence Act 1950; and

3. group 3, comprising grounds 4, 5 and 7, which stressed on the failure of the respondent to cross-examine the defence witnesses, and the failure by the judge of the Sessions Court to consider this failure. (In the process the defendants had highlighted the contradictions and the unreliability of the evidence of the plaintiff's witnesses).

Perusing the notes of proceedings, it was undeniable that this appeal hinged largely on the issue of findings of facts, a predicament most judges normally would like to avoid, bearing in mind that the presiding judge by comparison would be in a more superior position. He would be in an elevated position to assess not only the demeanour of the witnesses, but also advantageously positioned to appreciate the contents of the documents adduced by witnesses, with their expression and conduct thrown in. But it is also trite law that in certain circumstances, where the learned presiding judge has clearly erred, the court is not prevented from so interfering with that decision. Wan Hamzah SCJ in *Eastern & Oriental Hotel (1951) Sdn Bhd v. Ellarious George Fernandez & Anor* [1989] 1 MLJ 35 at p. 36, had occasion to say:

> It is trite law that an appellate court would in appropriate cases act upon its own view of conflicting evidence (see *Coghian v. Cumberland and Bigsby v. Dickinson*) and it was argued on behalf of the appellant that the judge had overlooked certain evidence which might otherwise have caused him to come to a different finding.

We would respectfully agree with the soundness of the observation made in *Armagas Ltd v. Mundogas SA* (The 'Ocean Frost') which reads:

> It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents to the witnesses' motives, and to the overall probabilities can be of very great assistance to a judge in ascertaining the truth.
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> In commercial cases there is usually a substantial body of contemporary documentary evidence. This is not strictly speaking a commercial case, but the relevancy of contemporaneous documents nevertheless holds true.

In the case of *China Airlines Limited v. Maltran Air Corporation Sdn Bhd (Formerly Known As Maltran Air Services Corporation Sdn Bhd) And Anor Appeal* [1996] 3 CLJ 163, Mohamed Dzaiddin FCJ (as His Lordship then was) at p. 175 had said:

> In the light of the above findings of the learned Judge, a fundamental question of principle arises, which is, whether in the circumstances of the case, this court can interfere with the findings of fact of the court below. It is a settled principle of law that in an appeal, where facts have to be reviewed, it is undesirable that the findings of the court below should be disturbed by a court of appeal unless it appears that those findings are clearly wrong, and more especially that it is undesirable to do so where the conclusions reached must to a large extent depend on the credibility of the witnesses and the impression formed by a court which has seen them and can judge theft honesty and accuracy (*Crofter Harris Tweed Co v. Veitch* [1944] All ER 142 HL per Lord Porter at p. 167). However, the authority for the above proposition is the speech of Lord Thankerton in *Watt or Thomas v. Thomas* [1947] AC 484, particularly the following passage (at p. 487-8):

I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion;

II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence;

III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.

On the other hand, there is a clear authority also from the House of Lords and followed by the Privy Council, which says that a distinction can be drawn between finding of a specific fact which depends upon the credibility of witnesses and a finding of fact which depends upon inferences drawn from other facts. In the latter case, an appellate court will more readily interfere with the trial judge's findings of fact and form an independent opinion than in the case of the former.

With that resounding authority and mandate before me, I failed to see how I could be impeded in disturbing an erroneous finding of facts as in the current case, bearing in mind that contemporaneous documents had been tendered but ignored, and inferences had been drawn from the available evidence. Following the beaten route of the defendants' submission, and after scrutinising the contemporaneous documents, which were made up of delivery notes, invoices and collection notes (apart from the oral evidence of all the witnesses), I found them to be imperative to the outcome of the case. P3, which comprised those delivery notes, invoices and collection notes, must have impressed the learned Sessions Court judge, for he gave judgment primarily on the contents of this exhibit. The learned counsel for the defendants before me, had submitted strenuously that the learned Sessions Court judge had considered P3 in isolation, and had not given sufficient consideration to the other relevant documents submitted by them, namely D2 (RR 288), D2A (RR288), D3A-K (RR290), D5 (RR309) and D6 (RR310). Aside from not having considered those documents, the learned Sessions Court judge had also failed to give careful consideration to the oral evidence adduced during the duration of the trial, in particular the evidence of SP1 (RR21) and SB1 (RR29).

It was not denied that all the documents in P3 had been translated, with their translations meticulously attached to them. Altogether there were 21 original delivery notes, five original collection notes, 14 original invoices and a total of 40 translations of the originals, totalling altogether 80 documents. I had occasion to scrutinise in some detail some of the documents, one of each in P3, among them one delivery note as exemplified in p. 214, an invoice from p. 206 and a collection note as at p. 222. The delivery note of p. 214 was issued by the plaintiff ie, by Hup Guan and delivered to Hup Lee, the defendants. The invoice, as per p. 206 was made to Hup Guan, whilst the collection note of p. 222 emanated from Hup Lee addressed to the plaintiffs. All three documents, strangely enough, bore no marks of acknowledgment or endorsement from the recipients of the documents.

Without being partisan, and being perturbed, I did pose the question as to how the defendants' documents could have landed in the hands of the plaintiff. Surely that predicament must have come about as a result of some business arrangement. No one had asserted that they were stolen or forged documents. As the hearing proceeded laboriously many more interesting facts began to unravel, notably in relation to the documents submitted by the defendants that were deliberately not dealt with by the learned Sessions Court judge. In the course of the hearing, I also had the opportunity to peruse D1 until D6, and ponder whether, if D1, D2A, D2B and D5 had been considered, would the learned Sessions Court judge have arrived at a different decision.

To appreciate the last sentence of the above paragraph, permit me to decipher some of the relevant documents. I begin with a letter from the defendants to a third party called Lian Yew Timber (or simply "Lian Yew"), pursuant to which the former had agreed to hand over a concession to them to fell trees at Hutan Simpang Compt 67 A in Kanaboi, Negeri Sembilan. The said Lian Yew had agreed to sell all the fallen timber logs under the concession licence to the defendants, at a purchase price to be determined according to the prevailing market price. There were also other conditions in the letter, which in short had attested to the fact that a business deal had been signed between Hup Lee (the defendants) and that third party (Lian Yew). That letter was dated 10 June 1988. At p. 206/207 is found an invoice for the earliest delivery by Hup Guan dated 29 September 1988. Yet at p. 288, I found complaints being voiced by the defendants, for the usage of Hup Guan's delivery note. This letter, dated October 1988, also reiterated the non-entitlement of Hup Guan to claim the purchase price of the timber. Further down at the bottom right of that impugned document was the confirmation by Hup Guan through one of its partners, of its non-entitlement of that purchase price. This self-destructive document, which was against the interest of the plaintiff, reads:

> I, Chin Soon Fah (NRIC No. 2010346), the representative of Perniagaan Hup Guan duly authorised herein, confirm that Perniagaan Hup Guan is not entitled in any way whatsoever to the purchase price of timber delivered to Hup Lee Trading by M/s Lian Yew Timber under the delivery notes of Perniagaan Hup Guan, and further that Hup Lee Trading is directed to pay the said purchase price to M/s Lian Yew Timber.

The total effect of D1 until D5 (which neutralized D6), read together with the remarks of Chin Soon Fat and his missive, *vis-a-vis* P3 and D6 as I see it, exposed the Sessions Court judge's decision to reject them, as being flawed. All those documents certainly confirmed that a contract between Hup Lee (defendants) and Lian Yew Timber did exist. If Lian Yew had internally subcontracted the works of felling the logs to Hup Guan, then Hup Lee ought not to be dragged into their transaction. If any debt was due from the defendants, it was for Lian Yew to seek recourse and compensation from them, but certainly not by Hup Guan. To appreciate the matter better, I need to clarify that Lian Yew, at the time when the contract was finalised with the defendants, was yet to be registered, and thus unable to fulfill the obligations of the contract, unless assisted by its parent company. The fact that Lian Yew had a running account, and of which RM150,000 had been advanced to it, merely confirmed their special relationship. Under the law too, particularly pursuant to the law of agency, the plaintiff would at best be the agent of Lian Yew, and hence legally incompetent to sue the defendants in this case (s. 183 of the Contracts Act 1950). Under s. 74 of the same Act the parties suffering may sue but not if otherwise, *Datuk Eric Taylor v. Lim Foo Yong & Sons Realty Sdn Bhd* [1990] 1 CLJ 415.

Apart from the lack of appreciation of the above evidence, the act of rejecting D1, D2, D3, D4 and D5 by the Sessions Court judge was a totally misconceived approach. In this case, pursuant to ss. 91 and 92 of the Evidence Act 1950, the learned Sessions Court judge had refused to consider D1-D5, as they were supposed to be extrinsic evidence. He merely relied on P3. Strangely enough, having rejected D1-D5 he relied on D6, another contemporaneous document, to prop up his findings of fact. The learned Sessions Court judge when adverting to the case of *Pernas Trading Sdn Bhd v. Persatuan Peladang Bakti Melaka* [1979] 2 MLJ 124, certainly had misconstrued it. Having read the case, nowhere does it say that under s. 92 of the Evidence Act 1950 all extrinsic evidence was to be totally rejected. It may be permitted for some limited purpose, as in this case, to show that if Dl-D5 had been considered, it would have proved that in reality no contract existed between the plaintiff and the defendants. Had there been proven that a contract existed between them, then not only would oral evidence be excluded but also extrinsic ones. In this case as the allegation was that there was no contract, the extrinsic and the oral evidence thus should have been considered.

The Role Of Chin Soon Fah

Who was he (DW1)? The missive of DW1 is *prima facie* evidence, documenting him to be an authorised representative of Perniagaan Hup Guan (or just Hup Guan), disentitling the plaintiff to any purchase price derived from the timber delivered to the defendants. He indisputably, not only was a partner in Hup Guan but also in Lian Yew, as confirmed by his own testimony, the certificate of the registrar of company and finally the admission of the plaintiff itself in open court. He, who was thus subject to the rigorous provisions of the Partnership Act had explained that in actuality the contract was between the appellant (defendants) and another company called Lian Yew, an entity also owned by the plaintiff. In fact Lian Yew was its vehicle. Thus, in spite of the abundant evidence of the strategic position of DW1 in Hup Guan and Lian Yew, and certainly the best person to straighten things out, the learned Sessions Court judge had still seen it fit to lean heavily on the testimony of PW1 and PW2 only. Equal consideration was not given to the evidence of the other defence witnesses.

Other Flaws In The Testimony Of The Plaintiff's Witnesses

Having perused the evidence it would appear that the witnesses of the plaintiff suffered:

1. the lack of knowledge to some of the questions posed;

2. the inability to produce documents to prove that a contract existed between the plaintiff and the defendants;

3. the invocation of s. 114(g) of the Evidence Act 1950 for the non-calling of a clerk who was supposed to know of the transaction;

4. weaknesses in the evidence of PW1 and PW2, in that they were attempting to explain away the invoices and delivery notes made by others but not called. Therefore their explanation or evidence bordered on hearsay, and thus irrelevant; and

5. the failure of the plaintiff to deny its relationship with Lian Yew during the cross-examination of DW1 and DW2 was fatal to its case. The defendants had consistently stood by the assertion that the privity of contract actually was between itself and Lian Yew. If that were to be so, the defence put forward by the defendant remained unshaken. The failure of the presiding judge to consider the inaction to demolish this stance was conspicuously obvious.

a At the end of the hearing of the appeal, and after having considered the totality of the above evidence, on the above reasons I had allowed the appeal with costs without any hesitation.

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